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United States
Circuit Court of Appeals
For the Ninth Circuit

OLGA SUNDIN, and MARGUERETTE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by Olga Sundin, their Guardian *ad Litem*,

Plaintiffs in Error,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

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This Writ of Error is prosecuted for the purpose of reversing a judgment of the district court, based upon a verdict of the jury, directed by the court, at the close of all of the evidence of the case.

But three questions of law are involved, other than claimed errors at law committed by the Court, in the admission and rejection of evidence, to-wit: Fellow servant, assumption of risk of the deceased, Alex Sundin, and concurring negligence of the master with that of fellow servants.

The negligence of the defendant which caused the injury and death of deceased is practically admitted, for the reason that the same was undisputed by the defendant. All adverse rulings of the trial judge were deemed excepted to, without exceptions being taken, as the trial progressed.

STATEMENT OF THE CASE.

ALEX SUNDIN, the father of the minor children, plaintiffs, and the husband of plaintiff Olga Sundin, was, on the 15th day of May, 1916, in the employ of the defendant company, as a member of a transfer gang of laborers, assisting in the operation of defendant's saw milling plant near Coeur d'Alene, Idaho. The company was engaged in manufacturing lumber. Its plant consisted of a sawmill, lumber yards, tracks, cars, and equipment of the character ordinarily used in large lumber manufacturing plants in the vicinity. Lumber was transported from the mill by means of an endless chain arrangement, out to the end of the sawmill proper. There the lumber was taken from the endless chain conveyer, by a gang of workmen designated, in the evidence, as the "chain gang." This chain gang's exclusive duties were to take the lumber from the conveyer, and load it

upon mill cars, and thereafter, as the cars were from time to time loaded, another gang, known as the "transfer gang," would, by hand power, shove these cars out, along and upon a short track, extending at right angles with the sawmill building and conveyer, and the car of lumber would be run upon tracks upon a transfer car, and thereafter, when two of the loads of lumber had been placed upon the transfer car, this transfer gang would run this transfer car upon another track, upon which the transfer car stood, out into the yards of the company, and said lumber was thereafter stacked in the ordinary lumber piles.

The exclusive duties of the transfer gang, of which Alex Sundin was a member, was to take the small cars, after they had been loaded by the chain gang, out into the yards, as heretofore described. The deceased and his gang, the transfer gang, had nothing whatever to do with loading the lumber on the cars from the endless chain conveyer. Neither was it his, or its, duty to inspect or superintend the manner in which the lumber was loaded upon said small cars, and had no opportunity so to do. On the side of the mill where the injury occurred, there were 68 short tracks extending out from the mill at right angles, from 22 feet to 30 feet in length. The transfer

car, upon which the cars of lumber were placed, was run and operated upon a track, running parallel with the mill, and at right angles with the short tracks, so that small cars could be run upon the floor of said transfer car from all of these 68 or 70 short tracks, as occasion would require. When a small car was loaded by the chain gang, the yard foreman would order the transfer gang to shove the car out at the end of the short track, and run it up on the transfer car, and have them take it out in the yard. This transfer gang would then come back and, as designated by the yard foreman, would immediately take out another car as ordered by the foreman.

In loading the lumber upon the small cars by the chain gang, it was the orders of the company and the custom to place in between the several layers of lumber, lath, to be used as cross-pieces or binders, the purpose of which was to prevent the load or any part thereof from falling off, while the same was being moved onto the transfer car, and out into the yards of the company. The loading of the cars, and the work being performed by the transfer gang was all under the special supervision, control, and direction of the yard foreman, Andrew Moe, whose duty it was to see that the work was properly performed accord-

ing to the orders of the company, and rendering safe the handling of the loads of lumber, by the transfer gang, which included the deceased.

The load of lumber which fell off of one of said cars, and caused the death of Alex Sundin, was not provided with cross-pieces or binders, which would have held the load together, had the same been placed thereon, said condition being one of the contributing causes which produced the collapsing of the load. The chain gang had negligently omitted to comply with their duty and the orders of the company in failing to place these cross-pieces or binders through the load, and the company had negligently failed in its superintendence of said work, to see that said load of lumber was safely and securely loaded so that the same would not collapse, and fall by reason of the ordinary and usual vibration or shock, produced in moving said car under the conditions of the track, then existing.

Alex Sundin knew of the custom and requirement of the chain gang and the duties of the yard foreman to see that said binders were placed in said loads, he, Sundin, having worked in the yard at this same class of work for a month and a half, and he having been an experienced man in that class of work.

When this load, which fell, was loaded, the foreman, Andrew Moe, ordered Sundin and his gang, consisting of Brewstead, Knudson, and Egstrom, to take this load out into the yard, in the ordinary and usual manner. There was not sufficient room for all four men to shove the car from behind, and under such circumstances, it was customary and proper for one of said transfer gang to take hold of the side of the car with his back to it, his hands holding the load, and shoving the car in that manner. Egstrom, Brewstead, and Knudson started the car from behind, and as the same emerged from between other cars of lumber on parallel tracks, either partially or wholly loaded, Sundin caught hold of the side of the car, as was usual, while the car was "on the fly," and all four men continued moving the car until it had proceeded about ten feet, and had arrived at the end of the rails, opposite the rails located on the floor of the transfer car.

The company had permitted, negligently, the sinking of the track over which the car was being propelled so that the short track that the car was on, was about an inch and a half lower than the short rails on the transfer car, and in order to get said car of lumber upon the transfer car, said four men, including Sundin, made two or three

trials by pulling the car backward and shoving it forward. The third time the attempt was made the load collapsed, and about one hundred boards, 1x6x16 feet, green lumber, fell off, down and upon Sundin, producing injuries which caused his death. If the tracks had been in reasonably safe condition, the same would have been maintained on a level with the rails on the transfer car, and no material shock to said car of lumber would have been occasioned, and said lumber would not have fallen, although the company had neglected to cause the usual binders and cross-pieces to be constructed and built therein, as the lumber was being loaded. In other words, it was the two conditions that produced the death of Alex Sundin.

The cross-pieces or binders being thin lath, were sometimes put in diagonally, so that the ends of the same could not be observed from the side, or the absence thereof noticed by a person performing the work which, and where, Sundin was performing in moving the car. The whole time consumed, from the time the car was first started by the transfer gang, until Sundin was injured, was only three minutes according to the evidence. The car of lumber consisted of six tiers of boards, 1x6x16 feet long, being from 45 to 50 boards high. The width of the car floor was about 48 inches,

and the rails upon which the wheels ran, but 24 inches in width. It was customary to put in from two to six strips in each load of this kind of lumber. The accident happened on Monday morning, May 15, 1916, upon the first load that was taken out by the transfer gang, upon this particular track. The previous week Sundin had been working on a night shift, and Saturday night, when Sundin quit the night shift, the track was about ¾ of an inch lower than the level of the track on the transfer car, of which Sundin had knowledge, and at the time the accident occurred, the track had settled from Saturday night to Monday morning until it was an inch and a half lower, of which Sundin had no knowledge. The cross-pieces used in these loads were "nearly all the time" kept overhead where the chain gang could get them. In moving these cars of lumber, there being only about 6 inches between the loads standing on the several tracks, Sundin could not get in between the cars when they were being started, so as to observe whether or not the binders had been put in, even if he had time to do so, but he had to grab hold "anywhere he could" while the car was in motion.

There was testimony to the effect that Moe, the yard foreman, had warned the men in presence of

Sundin, not to shove the car from the side "when it looked dangerous." He explained on redirect examination, what he meant by the term "looked dangerous" was when the load was improperly loaded, that is, leaning to one side or the other, or for any reason appeared liable to collapse. No warning was ever given about "absence of strips."

The car had only gotten about 3 feet on the transfer car when the lumber fell. This particular track was only 22 feet long. The car itself was 8 feet long. The car was being moved as rapidly as possible under the orders of the company.

Exhibit No. 1, being a photograph exhibited in evidence, will show the court the general arrangement of the tracks and loads of lumber. Sundin was never around the yard where, and when, the lumber was being loaded on the small cars, with any opportunity to observe whether or not crosspieces or binders were being inserted. It would take the transfer gang from 5 to 12 minutes to take each load out in the yard. All of the load which fell had not emerged from between the other loaded cars, at the time of the accident, so that Sundin had no opportunity to note whether or not binders were put in that part of the load con-

cealed by the cars standing on either side, even if they always extended through the load. It is customary to put in more cross-pieces or binders in narrow lumber, like that which fell, on account of it being "easier for that kind of lumber to fall off."

In plaintiffs' complaint it is alleged that Sundin knew of the uneven condition of the track. The evidence showed, however, without objection, that when the accident occurred, the track had sunken more than double the distance, to-wit: an inch and a half, than it was sunk on Saturday night, the last time Sundin worked on it, previously to the accident.

During the trial of the case, the Court permitted certain testimony, over the objection of plaintiffs' counsel, and rejected certain testimony and made certain remarks and rulings which we will take up in the order of the assignment of errors, and in detail, to the end that this Court may rule upon the same, in view of another trial, so that the trial Court may be guided by said rulings.

The deceased, at the time of his death, was 39 years of age, and in good health. He left a widow, and three minor children, who are the plaintiffs in this action. From the evidence Alex Sundin

appeared to be a careful, steady, painstaking workman, and one who was devoted to his family, and the providing of a home and maintenance for them.

At the conclusion of the evidence, the defendant moved the Court to instruct the jury to render a verdict for the defendant upon the ground that the death of Alex Sundin is conclusively shown to have been caused by the negligence of fellow servants of the deceased, and that Sundin assumed the risk of the injuries which resulted in his death, and that he was guilty of contributory negligence, which was the proximate cause of his death. The Court sustained the motion, and instructed the jury accordingly, eliminating, however, the claim of contributory negligence. The opinion of the Court and instructions to the jury, being made a part of this record.

Plaintiffs, in resistance of said motion, contended:

(1) That the safe loading of the lumber on the cars, which required the placing therein of cross-pieces or binders, was a non-delegable duty of the master, and the failure to use reasonable care to see that said loads were loaded safely by the chain gang, was negligence on the part of defendant, and the company cannot escape liability by delegating

that duty to other servants, whatever be their rank.

(2) That even though it should be held that failure on the part of the chain gang to place binders in the load and of the foreman failing to see that this was done was negligence of fellow servants, even then, it was at least a question of fact for the jury, as to whether or not, the load would have collapsed, and Sundin been killed, but for the condition of the tracks, negligently suffered and maintained by defendant, which Sundin was required to use, and which required the transfer gang to cause a shock to said car of lumber, in attempting to force it upon the transfer car tracks, striking the projecting rails thereof, and, negligence on the part of the company in this particular being practically conceded, it certainly was at least a question for the jury as to whether or not the *negligence of the master concurred with the negligence of fellow servants,* which produced the injury and death of the deceased.

(3) That while the complaint alleges Sundin knew of the *uneven* condition of the tracks, the evidence, which went in without objection, showed that the track was much lower, at the time of the accident, than it was the last time it was used by Sundin, the Saturday night previous, on the night shift, and therefore, he, Sundin, could not be held,

as a matter of law to have anticipated, appreciated, and realized the amount of shock which would be caused to the load of lumber in making two or three trials to force it over these uneven rails, and its resulting collapse.

(4) That even if it be held that Sundin knew of the exact condition of the rails at the time of the accident, and the shock which would be caused to the load of lumber, on account of forcing it over these rails, there being evidence that Sundin did not know of the absence of the cross-pieces and binders in the load, he could not have anticipated and assumed the risk incident to the collapsing of a load which he had a right to assume and believe had been loaded in a safe, secure and stable manner, and which in all reasonable probability would not have collapsed and fallen even with the existing condition of the rails, had the same been loaded in the usual and ordinary manner, and reasonably safe.

In explaining to the jury the Court's reason for directing a verdict, it erroneously compared this accident to an incident where "two men are sent out by a farmer to load hay on a wagon, both men engaged in doing the loading." The load being loaded unsafely, it falls off, and injures one of the men who had assisted in loading it.

It is a familiar rule of law, oftimes enunciated by this Court, and every other court, that where a challenge to the sufficiency of the vidence is interposed, the Court should consider not only the evidence, but all reasonable inferences which can be drawn from the evidence, in that light most favorable to the plaintiff. Therefore we have omitted from the above statement defendant's contradictory evidence. We will take up in the proper order our several contentions as to the law applicable to this case, so that they may be considered in logical order, and ruled upon by the Court.

WAS THE NEGLECT, TO SAFELY LOAD THE CAR OF LUMBER THE NEGLIGENCE OF THE DEFENDANT, OR SIMPLY THE NEGLIGENCE OF A FELLOW SERVANT OF DECEASED?

In considering this question, the Court must not get away from the fundamental principles involved. It is safer to follow general principles, than it is to find special decisions where the facts are the same, although we will cite a few decisions of that character in this brief. If we look to the "initial decision" on this question, being the case of Railway Co. vs. Farwell, embraced in the early decisions of the State of Massachusetts, which rea-

sons out the equities and justice of the fellow servant rule, it will be seen that the basic principle of the fellow servant rule is, "That it would be an injustice, to charge the master with liability, on account of the spasmodic and unanticipated act of a servant, producing an injury to another servant, and which could not have been prevented by any exercise of caution or care on the part of the master"; "that the injured servant has a better opportunity to observe, and anticipate negligent acts of his fellow servants, of a spasmodic character, than the master could possibly have; that one servant has the opportunity to influence care, upon the part of others working with him, in the same character or line of work."

It was never intended by the decision in the Farwell case, *supra,* to create an "unbridled license" to declare, every employe a fellow servant with every other employe. In this day and age all large manufacturing enterprises, are operated through the medium of corporations. Everyone connected with the corporation, in carrying out the main object, is, in some decree, a co-servant with every other servant. Corporations cannot operate in any other manner. In the case at bar, of course, it is conceded that everyone connected with this lumbering enterprise and producing lumber, from the

man who takes the logs out of the lake, up to the man who stacks the lumber out in the yard, are co-servants of each other, engaged in a common enterprise, the same as the operation of a railroad, or any other large enterprise, and if the Courts are going to hold, that every man is a fellow servant with every other man who is engaged in the same general enterprise, for whose acts of negligence the company is not responsible. then the law of liability of master to servant, has been repealed by the Courts.

Sundin, the deceased, belonged to the transfer gang. This gang's duties were wholly separate and independent of the chain gang, who had charge of the loading of the cars. Their duties and labors were as distinct as any other two branches of the work of producing lumber. Sundin had no power to give any orders to the chain gang, nor opportunity to inspect the loads, to see if they were properly bound, nor to order binders put in if the gang was forgetting or neglecting to do so; in fact he had nothing whatsoever to do with loading these cars of lumber, any more than a brakeman on a freight train would have to do, with loading cars of lumber or cars of machinery, or cars of anything else, which he, the brakeman, was required to work in and about in the act of transportation.

Sundin never knew what load was to be taken out in the yard until he was directed to take it out, by the yard foreman. The yard foreman was the man to whom the company had delegated the duty of saying when the load was *ready* to be moved by the transfer gang. The load could not be moved until this order was given, and the order to move any load, was in itself, an implied assurance on the part of the company, acting through its foreman, Andrew Moe, that said load was safe to handle, considering the conditions of the track and other appliances, which the deceased was required to use in performing his labor, of all of which the foreman had knowledge, and it was not for Sundin "to reason why, *his* but to do and die."

In the case at bar, Moe, the yard foreman, ordered Sundin, Brewstead, Knudson, and Egstrom to take out this particular car. Brewstead, Knudson, and Egstrom, according to custom, braced themselves with their backs to the end of the car, and moved the car from between other loaded cars until it had emerged about half way out upon the track from the other loads, when Sundin was required to, and did catch it "on the fly" (in the language of one witness), with his back to the side of the car, his eyes facing in an opposite direction, and continued to keep the car in motion so

as to place it upon the transfer car, never having the slightest opportunity, to observe, whether or not the company had performed its duty in providing cross-pieces through the load to keep it from collapsing, even if it had been his duty to have "inspected and observed," which subject we will discuss later in this brief under the heading of "Assumption of Risk." We insist that the company owed to the deceased the non-delegable duty of superintendence. The company knew or ought to have known the condition of these tracks, that it would be necessary to shock the load more or less in forcing it over these uneven rails. The company neglected to either repair the rails, remove the danger incident thereto, or to superintend the work of the chain gang, in seeing to it that said load was so provided with binders, and loaded in such a safe manner, as to prevent it from collapsing, when receiving the shock necessary for it to receive, by the transfer gang forcing it upon and over this defective track.

If this failure and neglect of duty can, by some sort of judicial legerdemain, or legal sleight-of-hand be shifted from the master to his servants, so as to escape liability, then all duty and obligation on the part of the master is at an end, the pretended law of "master and servant" is a farce, and

the Courts ought to come out in plain language and say so, instead of trying to argue it out, in some attempted logical, plausible manner, producing the same result. This Court has held in numerous decisions, which we will cite, and the Supreme Court has held in the famous cases of Railway Company vs. Ross, and Railway Company vs. Baugh, which are familiar to this Court without special citation, that the determining characteristics, or distinguishing features, of, when an act was, or was not that of a fellow servant, so as to eliminate liability of the master, did not depend upon the rank or title of the particular individuals, but "the character of the act which the servant was performing or required to perform." Let us ask here, in all sincerity, what was the "character of the act" of placing or failing to place binders in this load of lumber, so as to make the load safe for Sundin and the gang to handle, over and upon the defective track which they were required to use? Was not this in the nature of providing a safe place, and safe instrumentalities, about which servants were required to perform their duties, and was not this a non-delegable duty of the master to so provide? How long has it been, since the Courts have been educated to the position, where they feel justified in holding now, as a matter of law, that neglect

to furnish safe instrumentalities and safe appliances, and to do work by safe methods, and failure to superintend, is the negligence of fellow servants, for which the master is not responsible? Association of individual workmen in the same lumber yard is certainly not a controlling factor. One man may be working in arm's reach of another and still be performing the duty of the master, and the other the duty of the servant. It will be contended that the cross-pieces were provided by the company, and placed somewhere "over-head" and the chain gang could get them and put them in the loads, and the neglect so to do was simply the neglect in the carrying on of the "details of the work," and is therefore negligence of fellow servants. Of course, all negligence which produces injuries, pertains to some "detail of the work." The term "details of the work" is a very much abused term. If a car repairer fails to make safe and secure repairs to a locomotive, he is negligent in the performance of some "details of the work." If the master fails to provide a safe machine, or fails to maintain it in a reasonably safe condition, this also pertains to "details of the work," but we cannot get away from the one proposition, no matter how much we spar and delve into mysterious labyrinths of legal gen-

ealogy, and that is this, the load of lumber was unsafe to be handled by Sundin in the manner in which he was required to handle it. It was the duty of the master to see that it was prepared so as to be reasonably safe, to be handled in the manner required over this defective track. The yard foreman failed and neglected to so superintend this work that the carload of lumber was rendered unsafe, and was one of the proximate causes of the death of Alex Sundin, and was one of the causes which deprived the widow and children of their husband and father, without any fault on their part or of Sundin himself. That is the net result, and that is the cause of the result, and no matter how much we speculate or conjecture, we argue ourselves back into the same position.

According to the defendant's theory and contention, all that a corporation has to do is to subscribe some of its capital stock, promote an enterprise of no matter how hazardous character, place all of the details of the enterprise in the hands of bosses, superintendents, and workmen, and then turn its back on everybody, and if some one of their men get hurt or killed, scream "fellow servant." Let us ask in all sincerity, what "original principles" of the fellow servant rule are in-

volved in this case? Was the failure to put the strips through the load, to make it secure, a spasmodic, unanticipated act on the part of the company's servants? If the foreman had exercised ordinary superintendence, could he not have observed, as the load was being constructed, that the chain gang was failing to put these strips through the load? It was simply a failure to "safely construct," in which Sundin took no part. How could Sundin have "influenced" the manner of loading these cars, or of putting the binders through the load? He had nothing to do with the loading. He had nothing to do with the load until after it was loaded, and was ordered to do something with that load. He and his gang were out in the yards, performing their line of duty, and had no opportunity to influence safe methods in the loading of cars, or anything incident thereto. If the company delegated this duty to the "chain gang" then, under the law, this gang became "the master."

The trial judge, erroneously, we think, in instructing the jury, compared the work being done by Alex Sundin, and the work being done by the chain gang, as being similar to a farmer, sending two men out in a field to load a lot of hay on a wagon, where one man pitches the hay up on the wagon, and the other man places it, forming the

load as it is built up by the joint and combined acts of the two men. In that case each man has an opportunity to see and influence just how the load is being built, and whether or not it is safe. This thought of comparison, being in the mind of the Court, is undoubtedly what led him into error in the case at bar, where the facts and circumstances, and principles of law are wholly different.

AUTHORITIES ON FELLOW SERVANT RULE AND DUTY OF SUPERINTENDENCE.

At the trial of the case, we cited and presented to the trial Court, the cases decided by the Washington Supreme Court, of Dumas vs. Walville Lbr. Co., 64 Wash. 381; Zintek vs. Stimpson Mill Co., 9 Wash. 395; and Gaudie vs. Northern Lbr. Co., 34 Wash. 34.

The Gaudie case, *supra,* seems to be on all fours with the case at bar. Respondent received injuries while assisting in moving a car of lumber to the drying kiln of appellant. The cars were moved by men pulling and pushing them. The tracks ran in parallel directions, and there was sufficient space for one to pass safely between cars, if no protruding objects intervened with the passage. Respondent was called in from the lumber

yard to assist in moving the car. He passed in between that car and one on the adjoining track, and stationed himself alongside of the car, and began pushing the same. As the car proceeded, some protruding cross-pieces in the car of lumber caught respondent in such a manner that he was wedged between them, and he was injured thereby. It was alleged that the lumber was piled in a negligent manner, under the direction of the appellant's foreman, in that the cross-pieces projected into the space between the cars.

Appellant in its answer, pleads assumption of risk, and contributory negligence. The opinion is very instructive on the question involved in this case with reference to assumption of risk, but we intend to argue that question later in this brief. On the question of fellow servant, the Courts say:

> "We think there is no question of fellow servant seriously involved in the case. It sufficiently appears that the lumber was piled under the direction of appellant's foreman, and, under his direction, respondent was called to assist in moving the car. The foreman was a vice-principal, within repeated holdings of this Court; and if the lumber was negligently piled, and if that was the proximate cause of the injury, appellant itself, and not a fellow servant, became chargeable therewith."

The Dumas case, *supra,* was a case where lum-

ber had been negligently piled in a lumber yard of defendant. Adna Hill was yard foreman and all the men in the yard and on the docks were under his immediate direction. He had the supervision of the piling of the lumber both in the yards and on the docks. It was necessary for the plaintiff and other men to work around and upon this pile of lumber. The foreman, Hill, testified: "He did any work he was directed to do, such as piling lumber, loading cars, picking up in the yard, or whatever consisted of yard work." Hill directed the plaintiff and other men to do some work stacking lumber. They proceeded in the usual manner, when a part of the lumber pile fell off upon Dumas, injuring him. The negligence charged was that the place where respondent was ordered to work was unsafe, in that the pile of lumber on the dock was so negligently constructed, under the direction of the foreman, and presumably with his knowledge, as to make its fall imminent on any added weight. The defenses of fellow servant, contributory negligence, and assumption of risk were also interposed. The Court say:

> "It is contended that the rule requiring the master to furnish a safe place to work does not only apply because 'the place to work

was being changed constantly.' It seems to us that piles of lumber impending some 12 to 16 feet directly above the place where men are required to work makes a situation well illustrating the reason and necessity of the rule. Manifestly there could have been but little change in the pile in the short time appellant and Woosen were at work. There is no evidence that either Woosen or the Japanese or any one else had so changed conditions as to make the place unsafe had the lumber been piled as the foreman, Hill, testified was usual. Nor can the defense of injury by negligence of fellow servants apply. The duty to see that the lumber was piled in such a manner as to make the place reasonably safe was a non-assignable duty of the master. The rule announced by this Court in the Zintek cases is plainly controlling on the evidence here. Zintek v. Stimson Mill Co., 7 Wash. 178, 32 Pac. 997, 33 Pac. 1055; Zintek v. Stimson Mill Co., 9 Wash. 395, 37 Pac. 340; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801; Hennessy v. Boston, 161 Mass. 502, 37 N. E. 668.

No evidence was offered to sustain the defense of contributory negligence other than that more properly applicable to the defense of assumption of risk. While it may be fairly said from the evidence that, if respondent had made an inspection before descending from the dock, he could have discovered that the lumber was insecurely piled, still can it be said that, under the circumstances, he assumed the risk, as a matter of law, by not making the inspection? We think not. If, in proceeding without inspection to his place beneath the dock, to which he was ordered by the foreman, he acted as a reasonably pru-

dent man receiving a like order in the same circumstances would have acted, then it cannot be held, as a matter of law, that he assumed the risk. It is true, as appellant contends, that the foreman did not specify which of the two men should go below, but he did take them to the lumber pile on the dock and did tell them to stack it on the pile bottom beneath. He says that this could only be done by one of them getting upon the pile and the other going to the ground below. This was certainly equivalent to an order to the one who did go, and respondent must be held to have acted upon a direct order from the foreman. On these facts, the question of assumption of risk was for the jury, under proper instructions. Liedke v. Moran Bros. Co., 43 Wash. 428, 86 Pac. 646; De Mase v. Oregon R. & Nav. Co., 40 Wash. 108, 82 Pac. 170; Goldthorpe v. Clark-Nickerson Lum. Co., 31 Wash. 467, 71 Pac. 1091; Dean v. Oregon R. & Nav. Co., 38 Wash. 656, 80 Pac. 842; McGovern vs. Central Vermont R. Co., 123 N. Y. 280, 25 N. E. 373; Chesson vs. Roper Lum-Co., 118 N. C. 59, 23 S. E. 925; Bunker Hill & S. Min. etc. Co. v. Jones, 130 Fed. 813."

In the Zintek case, *supra,* the plaintiff was injured by a pile of lumber falling on him, because it was improperly piled.

> "There was evidence to show that lumber properly piled should stand by itself independent of other piles; that this particular pile had been constructed between two other piles, and that the foundation consisted of narrow strips thrown in between said two piles *without any cross-pieces;* that it was usual to have cross-pieces in the piles."

The Court, after saying that it saw nothing in the record to charge Zintek with contributory negligence, or assumption of risk, affirms the judgment for plaintiff, holding the company liable for the negligent piling of the lumber, and while the Court does not argue the question of fellow servant, it will be noted in the case, that the grounds of appeal were three; first, insufficient proof; second, contributory negligence; and third, negligence of fellow servants.

We have found another case, which is much later than those heretofore cited. Mattson vs. Eureka Cedar Lum. Co., 79 Wash. 266. In this case the plaintiff, at the time of the accident, was engaged in taking bundles of lumber from trucks, as they were brought into a shed, assorting them, and leaning them against appropriate piles, when a part of the lumber fell on him, injuring him. The negligence charged was that defendant failed to furnish a safe place to work, and that it negligently caused to be piled and maintained an unsafe, unsecured, and unstable pile of lumber, *not braced.*

In passing upon the case the Court say:

> "The law applicable to this state of facts is elementary. It is too well established to

> require citation of authority, that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive, non-delegable duty, which carries with it the duty of reasonable inspection. It is also well established that, when a servant proceeds to work in a given environment, under a direct order from the master or the master's representative, he does not assume the risk of any dangers not so open and apparent as to be detected by ordinary observation. Applying these principles, it is clear that the questions whether the appellant had met its duty to furnish the respondent a reasonably safe place in which to work, and whether the respondent pursued the rule of reasonable prudence in proceeding to work without inspecting piles of lumber to determine the safety of the place, were, under the evidence, questions for the jury."

The Court will note in reading these Washington cases, that the liability is based upon the "failure on the part of the master through its representatives, to perform the non-delegable duty of keeping the surroundings and appliances, structures and loads of lumber in a reasonably safe condition, so that another person, called upon to perform a specific duty, ignorant of any danger, would not be subjected to a risk of which he knew nothing, and which he did not appreciate. We desire to emphasize at this point, the fact that the Washington decisions are not based upon the

"difference in rank" between the person whose duty it was to put the strips through the load, and the injured person.

The Court may see those decisions do hold specifically and point blank that the failure on the part of the master to have the piles of lumber constructed safely "was a non-delegable duty of the master."

The decision in the Mattson case, *supra,* particularly says:

> "The law applicable to this state of facts is elementary. It is too well established to require citation of authority, that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive, non-delegable duty, which carries with it the duty of reasonable inspection."

This Court may have in mind, the fact that some years ago, the Supreme Court of Washington, in a decision, adopted the rule with reference to fellow servants announced by the Supreme Court of the United States in the case of Milwaukee Ry. Co. v. Ross, 28 Law Ed., U. S. Supreme Court Reports, 787, and refused to follow the rule laid down by the same Court in the case of Baltimore & O. Ry. Co. v. Baugh, 37 Law Ed. 772. In the

first place, we assert with the utmost confidence that the Baugh case does not over-rule the Ross case. A great many courts have been led into error in assuming that it did, probably due to a hurried reading of the opinions. The Ross case, is based upon the negligence of the conductor in failing to show the engineer of the train, his train orders, he had charge of the whole train, and represented the master, and while the orders came through the train dispatcher, by telegraph, it was the duty of the conductor to, in some manner, give the orders to the engineer, where, when, and how to operate his train, no matter where the conductor received the orders from. In other words, the conductor failed to superintend and direct the movement of the train, in a safe manner, which failure was clearly the negligence of the master, and the Court permitted a recovery.

In the Baugh case, the fireman of a light engine was injured by the negligence of an engineer, and the Baugh case distinguishes that case from the Ross case.

The controlling feature of the Baugh case was the fact that the engineer and the fireman were both fellow servants, engaged in the one enterprise of operating that engine, and no matter what

the rank of the engineer was, while he and the fireman were operating that engine, by their joint labors, they were both fellow servants. The Supreme Court of Washington, however, adopted the rule that where the manager or superintendent controlling the operations was himself negligent in the manner of carrying on his duties (*i. e.,* the duty of superintendence), that this was the negligence of the master, and the superintendent's postion, his control and direction, made him the representative of the matser. The Court assumed that the Baugh case was antagonistic with this principle, but in fact, it is not. However, all of the decisions of the Supreme Court of Washington have laid down and held strictly to the rule "that it was the character of the act, and not the rank of the individual" which determined the question of the master's responsibility, under the fellow servant doctrine. This is also the rule of the Federal Courts. But we do not have to rely upon Washington decisions. We have failed to find one decision announcing a contrary doctrine to that contended for by us on the question of fellow servant, under the facts in the case at bar.

The case of Louisville & N. R. Co. vs. Clark, 106 S. W. 1184 (Kentucky), is a case where coal was negligently loaded on the tender of an engine. A piece of coal fell off and injured a brakeman while

he was working in the vicinity of the tender. The Court say:

> "Appellant's counsel contends that the Court erred in permitting appellee to recover for ordinary negligence on the part of appellant's servants who loaded the tender with coal, claiming that they were fellow servants with appellee. This precise question was thoroughly considered and determined in the case of L. & N. R. R. Co. v. Brown, 106 S. W. 795, the opinion in which was delivered January 9, 1908. Appellee was not in the same department of service with those who loaded the tender with coal, nor was he with them, so that he could control or advise them in the performance of their work. The case of Gulf, C. & S. F. Co. v. Wood, 63 S. W. 164, an opinion of the Texas Court of Civil Appeals, is like the case at bar. In that case an employe of a railroad company was injured by the falling of a lump of coal from the tender as it passed the place where he was at work, and the Court said: 'It is not shown in the evidence what caused the piece of coal which injured appellee to fall from appellant's passing train. According to the testimony of appellant's trainmen, the tender was properly loaded with coal when the train started on its journey, and that in taking coal from the tender to the fire box of the engine it was carefully handled. The fact that in passing the appellee a large piece of coal fell or was thrown from the train with great force is all the evidence found in the record tending to show negligence on the part of appellant. We find, in view of the principles of law hereinafter stated, which we think are applicable to this case, that such fact is of it-

> self, under the circumstances, sufficient to support the verdict of the jury in finding that appellant was guilty of the alleged negligence and that such negligence was the proximate cause of appellee's injury. There is no evidence, which, in our opinion, tends in the least to show that the appellee was guilty of contributory negligence, or that the cause of his injury was a risk assumed by him as an incident to his employment.' "

The case of Gulf, C. & S. F. Ry. Co. v. Wood, 63 S. W. (Texas) 164, is also a case where negligently loaded coal fell from a train injuring another employe, and the charge of negligence was that the coal was negligently loaded. The Court affirms judgment for plaintiff, holding the company liable for the acts of the particular servants who negligently and improperly loaded the coal.

The case of Baldwin vs. St. Louis etc. Ry. Co., 39 N. W. 508 (Iowa), was a case where lumber was negligently piled in a lumber yard. The same fell and injured another employe. It was contended there, that those who piled the lumber were fellow servants of the injured workman. The Supreme Court of Iowa say:

> "Counsel for defendant insists that the evidence fails to support the verdict, and the Court below, therefore, erred in refusing to direct a verdict for defendant. This objection is based upon the claim that plaintiff, not

being engaged in the operation of the railroad, cannot recover for the negligence of a co-employe, and that the negligence, if any were shown, was of a co-employe. We think the evidence tends to show negligence on the part of the person having charge of the piling of the timber, and its care, which caused the injury. This person had full control of the timber yard, employed and discharged men, and is to be regarded as a vice-principal. He was sometimes absent from the yard, and the care and management of the business and matters were committed to or devolved on another, who took his place, and exercised the authority with which he was charged. This other person is therefore to be regarded as a temporary vice-principal in the place of his superior. The evidence tends to show negligence on the part of those persons who were in charge of the timber, and directed the manner of piling it."

We desire especially, to call the attention of the Court to the case of Brooks vs. W. T. Joyce Co., 103 N. W. 91 (Iowa). This is a case where a pile of lumber fell because of the absence of cross-pieces or binders, and the Courts say:

"* * * Plaintiff, at the time of receiving the injuries complained of, was a workman employed about its yards. Under the instruction of one Brown, who had charge of the work in the yard under the direction of the defendant's superintendent, plaintiff was engaged in loading a wagon with bundles of maple flooring being taken from a pile of such lumber, and while thus engaged he was injured by bundles from the pile falling

against him and breaking his leg. The negligence charged is that the bundles of flooring were piled up without cross-pieces, which would have rendered the pile firm and secure, and which was the usual way of piling such lumber. It is claimed for the defendant that the defective piling of the lumber was the result of the negligence of a co-employe; that the danger was open and apparent to the plaintiff, and was assumed by him; and that plaintiff was guilty of contributory negligence.

The argument for appellant is largely directed to the proposition that the negligent piling of the lumber was not merely the act of a co-employe, but was chargeable to the defendant, as a failure to provide the plaintiff with a safe place to work. We are inclined to think that this contention is sound, for, if defendant allowed its piles of lumber to be so made and kept as to constitute a menace to the safety of employes, it could hardly be permitted to say that the piling was originally done by its employes, for whose negligence it would not be responsible."

In connection with this case, the Court will probably notice that the Supreme Court sustains the ruling of the lower Court, granting judgment *non obstante* on the ground that the plaintiff assumed the risk, but the facts are much stronger against the plaintiff in this case, than they are in the case at bar. In the Brooks case the plaintiff testified that if the cross-pieces had been used, that fact would have been readily apparent to him. That he went past this pile of flooring many times a

day, and had often been engaged in taking lumber from it to load upon wagons; that he could have seen, when attempting to take bundles from it, at the time of the accident whether or not cross-pieces had been used in piling it. We think the Court was justified in that case, in holding that plaintiff assumed the risk, but the case, as to original liability of the defendant, and upon the question of fellow servant is on all fours with the case at bar, sustaining appellant's contention.

We ask the Court to read the former opinion of the Court in Baldwin vs. St. Louis etc. Ry. Co., 33 N. W., p. 356. This is very instructive on the question of assumption of risk, where the facts are substantially the same as in the case at bar.

The case of Pennsylvania Ry. Co. v. La Rue (C. C. A. 3d Circuit), 81 Fed. 148), is a case where the company failed to provide and maintain in a safe condition, standards for the holding in place of lumber on a car. The Court say:

> "In the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use, and permanently attached to the car by chains, or are unattached and intended for use on a single occasion, are appliances necessary for

> the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body."

We can see no difference between the cross-pieces which ought to have been put through the load which fell and killed Sundin, and the side stakes which are placed on a car to prevent the load from collapsing. Both strips and side stakes are used for the same purpose, and only for the purpose of keeping the load from falling off. What difference does it make whether side stakes are used or cross-pieces? The purpose is the same and if it was negligence on the part of the company, for which it was liable, to fail to provide and maintain side stakes for the purpose of keeping the lumber from falling off of the car, how can it be argued that it was not the same "character of act" in failing to provide and insert cross-pieces or binders as in the case at bar? It is a distinction without any difference, and there can be no distinction in law. Of course, we can see a possible reason for argument along the line contended for by defendant, where lumber falls off of a car because it is piled in a leaning manner, or so loosely that the least jar might shake it off, but the negligence charged in the case at bar is not the negligent manner in which the boards were placed on

the car, but failure on the part of the master to provide the necessary safety appliances to keep the load safe while being handled, and moved over a defective track by servants who are called upon to perform the particular act of moving the car.

Even the good old, conservative state of Massachusetts, whose Supreme Court laid down the original rule of "fellow servant" in this country (Farwell vs. Ry. Co.), agrees with our view on this question. See Macintyre vs. Boston & M. R. R., 39 N. E. 1012. In this case the defendant furnished rotten and insecure stakes to hold a load of lumber on a car, which was to be moved. The stakes broke because they were rotten, and a brakeman was injured, who was assisting in moving this car. It was claimed in that case, as in the case at bar, that the master had furnished reasonably good and sufficient stakes to the servants who neglected to put sound and strong stakes in the car, and therefore, the duty of the company was ended. But the Supreme Judicial Court of Massachusetts overruled this contention and held that:

> "In trusting to suitable servants the duty of furnishing suitable appliances for the work does not discharge an employer from the consequences of negligence on the part of such servants in providing safe and suitable appliances."

And that the furnishing of these stakes and placing them in the car was an act for which the master was responsible, and the fellow servant rule does not apply.

Another point in this case that we strongly urge and on which we will cite authorities, is that the master owed to Sundin the duty of superintendence, that is, the master could not turn its back on its employes, let them perform their labors in whatever manner they saw fit, without any superintendence or direction, and then claim that any injury resulting was caused by fellow servants, for which the company would not be liable.

In the case at bar there was a superintendent in charge of the work. The loading of the cars, and all other work was under the special direction of Moe, the yard foreman. Sundin had a right to assume that the manner of loading these cars would be superintended by Moe, or someone else. Sundin could not superintend it. If there had been no yard foreman, whose duty it was to superintend and keep safe the surroundings, and Sundin knew of this fact, that would be another question, but Sundin was lulled into a sense of security by the action of defendant in providing a superintendent, but one who did not superintend. He neglected to superintend, and

this certainly is the negligence of the master, because the duty of superintendence is a non-delegable duty of the master.

> "The master must be held responsible for such reasonable, constant and steady supervision of his servants that they will not be permitted to become grossly or criminally negligent." Hill v. Big Creek Lumber Co., 108 La. 162, 58 L. R. A. 346, 32 So. 372.
>
> "The master is under obligation to have a responsible representative in charge of a sawmill while it is running." Johnson vs. Moter Shingle Co., 50 Wash. 154, 96 Pac. 962.
>
> "The duty of superintendence, whenever the work is of such a character as to require it, devolves upon the master." Olson vs. Erickson, 53 Wash. 458, 102 Pac. 400.
>
> "The business of loading a schooner with lumber cannot be carried on without supervision." Anderson vs. Globe Nav. Co., 57 Wash. 502, 107 Pac. 376.
>
> "From the nature of the work in which the men were engaged, being ordered from place to place on the work, and to do this work, which from its hazardous nature, it was the duty of the master to superintend, his obligation to superintend the work was such that he could not shift it by delegating the oversight of the workmen and the work to an employe, who in all other respects would be a fellow servant." Steube vs. Christopher & S. A. Iron and Foundry Co., 85 Mo. Appeals, 640.

See also: Note to Engleking vs. Spokane, 29 L. R. A. (N. S.) 481.

This is the universal holding of all of the courts, therefore, we contend on this point, that:

First: It is the duty of the master to see that these cross-pieces were put in the load before Sundin was required to move it over a defective track, the movement of which would cause a shock to the loaded car. This duty was delegated to the foreman, Moe, who neglected to perform it, but trusted and directed the chain gang to perform this particular duty. The delegation of this particular duty to the chain gang did not make the negligence in failing to perform it, the negligence of fellow servants. The duty of the master to provide these safety appliances was a continued one, and no matter how many times the duty was delegated from one servant to another, each servant represented the master in performing or failing to perform a non-delegable duty of keeping the place, work, and premises safe for other employes in Sundin's position.

This subject is treated at length in the 4th Volume of Labatt's Master and Servant, under the head of "Vice-Principalship," commencing at Sec. 1470. The author attaches numerous decisions sustaining our contention here.

We desire to call the Court's special attention

to a decision of this Court in the case of Port Blakely Mill Co. v. Garrett (Ninth Circuit), 97 Fed. 537, and numerous cases cited in support of this decision, in which it is held:

> "Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability for personal injuries sustained by an employe by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a co-servant of the person injured."

This Court must keep in mind that these stakes are only for the purpose of keeping the load of lumber from falling off, the precise purpose for which the cross-pieces were ordinarily used, to keep the load from falling off as it did upon Sundin.

In the case of Illinois Steel Co. v. Schymanowski (Illinois), 44 N. E. 876, the Court say:

> "Unquestionably it was the duty of the appellant company, when, through its foreman or superintendent or boss, it ordered appellee to work near or alongside of the pile of ore, to see to it that the pile was safe. Appellee had nothing to do with the construction of the pile, or with the loosening of its material by means of explosives. He knew nothing

about its condition. A foreman in charge of workmen, and clothed with the power of superintendence, is bound to take proper precautions for the safety of the men at work under him."

DID SUNDIN ASSUME THE RISK INCIDENT TO THE CONDITION OF THE TRACK?

The trial Court undoubtedly misconstrued or misunderstood the allegation of our complaint, which is as follows:

> "That while said Axel Sundin knew of the difference in the heighth of said track with the said transfer car, and the necessity for violent and extraordinary movement of said car, * * * he complained to the said foreman, Ed Moe, * * * and said Moe as foreman, * * * there and then ordered him to go on and assist in moving said car, regardless of the condition of said track, which order was pre-emptorily given and said Sundin, * * * proceeded with the performance of his duties as instructed by said foreman, Moe, and did perform the duties required of him, as hereinbefore mentioned."

This is not an allegation that Sundin assumed the risk incident to the defective condition of the track. This admission of knowledge of physical conditions, is not necessarily an admission of knowledge and appreciation of risks of danger incident to physical conditions or the extent of

the danger. Of course, there are some cases where the Court will hold as a matter of law, about which no two reasonable minds could differ, that a man of ordinary intelligence must have known and appreciated a risk of danger which was clearly apparent to any reasonable man. The complaint alleges that Sundin knew of the uneven condition of the rails. In other words, he knew they were uneven. He knew that it would require some shock to a load of lumber to force it over uneven rails, but he did not know at the time of the accident, of the *extent* of the unevenness of said rails, as the undisputed evidence shows that Sundin worked on the night shift all of the previous week, and Saturday night of the previous week, when Sundin performed his last act on this track, it had only sunken three-quarters of an inch, that is, there was only three-quarters of an inch difference in the heighth of the rails; therefore, in the absence of any evidence to the contrary, the jury would have a right to assume that he did not understand or appreciate the fact that between Saturday night and Monday morning, when he took out the first load, and was hurt, the track had settled down another three-quarters of an inch, which would cause a much greater shock to a load of lumber. than was caused when he last ran a car over said

rails, and regardless of the complaint, the evidence was admitted without objection, that the rails were much lower when Sundin was killed than they were the last time he worked on them, and the evidence, having been admitted without objection, the complaint must be deemed to be modified to conform with the proof on this subject. Can Sundin be charged with having expert knowledge, of just how much shock a given condition of rails would cause a load of lumber? He had years of experience around lumber yards, doing this same class of work, but there is no evidence, that he ever before was required to work or did work, forcing loads of lumber over defective, unsafe, insecure, and settling tracks, so as to be able to appreciate and observe the amount of shock which would be caused by shoving a load of lumber over a certain condition of rails.

Assumption of risk, is at best, a mere fiction of the law. It was never intended to cover facts embraced in the case at bar, or anything similar to it. It is fundamental that a workman assumes all usual and ordinary risks, incident to the class of work which he is employed to perform, and he contracts that, in consideration of the amount of compensation he receives, he will not hold the master liable for injuries resulting from those con-

ditions. Can it be assumed that Sundin ever contracted, either expressly or impliedly, for the mere wage of $3 per day, that he would not hold the master responsible for injuries occasioned by its negligence to perform its positive, legal and humane duty? To allow defendant to escape liability in cases of this kind would be offering a reward for negligence in not maintaining and keeping reasonably safe, conditions and appliances, about and upon which men are required to labor for corporations. What inducement is there for the corporation to go to the extra expense of keeping up its track repairing, and maintaining safely its appliances, or employing competent and cautious fellow servants, or hiring superintendents, if it can never be held liable for its failure so to do? The testimony also shows that this car of lumber was 48 inches wide. The track was only 24 inches wide. Was Sundin supposed to crawl down under the car and see how much the track had been permitted to sink during the 48 hours of time, he had been absent, so as to know and appreciate every risk and characteristic incident to this track; to figure out, analyze, and reason out the result of the laws of Physics, and appreciate and understand, not only all of the physical facts, but the law of forces, so as to determine whether or not there

was risk in performing the duty which he was attempting to perform and was ordered to perform in the interest of his masters?

Another circumstance the jury would have a right to consider is this: Sundin had a wife and three children. He must have known and appreciated, that if he was injured or killed, it meant not only pain and suffering to him, but incalculable pain and suffering to his wife and little ones. Would he have placed himself alongside of this car, and performed the duty which he was performing, if he had the slightest thought or appreciation of this load toppling off upon him? We think not, and the jury has a right to consider this circumstance as well as all others. It was shown by the evidence that he was a careful, considerate father and husband. It is not shown that he was given to recklessness, or the incurring of danger.

DID SUNDIN ASSUME THE RISK RESULTING FROM THE DEFECTIVE CONDITION OF THE RAILS, CONCURRING WITH THE UNSAFE CONDITION OF THE LOAD OF LUMBER ON ACCOUNT OF THE ABSENCE OF CROSS-PIECES OR BINDERS,

BOTH OF WHICH CONDITIONS CONTRIBUTED TO PRODUCING HIS DEATH?

It is a well known and elementary proposition of law that "the negligence of the master concurring with that of a fellow servant of the injured employe, producing the injury, renders the master liable for such injuries." This Court has enunciated this principle so many times that it is useless to cite authorities and we apprehend defendant will not argue to the contrary. Assumption of risk, as stated before, is based upon the theory of the law, that an employe contracts to assume certain risks for extra compensation, and also if certain dangerous conditions develop during his work, of which he has knowledge, and the danger of working in connection therewith, which he appreciates and understands, he will be deemed to have consented to continue his work, notwithstanding said developed dangerous conditions, but the elements essentially necessary, which must exist in order to charge the employe with "assumption of risk," are, first: The dangerous conditions must exist; second, The employe must not only know of the physical existence of certain conditions, but it must be shown that a reasonable man, situated as he was, must have appreciated and reasoned out from cause to effect, the danger and ex-

tent of the danger of said conditions; third, The employe *must have knowledge of all of the conditions which may produce an injury.* Mere knowledge of one condition and ignorance of the other, would not charge him with assumption of risk; fourth, It must be shown conclusively that the employe, having knowledge of the physical conditions and realizing and appreciating the results which ought to be expected in performing his labor, under said conditions, voluntarily incurred the risk which was open and apparent, threatening and imminent.

This Court has enunciated these principles dozens of times, and in conformity with the decisions of the Supreme Court and all other courts on the question of assumption of risk. The record is absolutely barren of any incident or circumstance from which the inference could be drawn that Sundin knew of the absence of the cross-pieces or binders from the load which fell over on him. From the most favorable standpoint to defendant this was at least a question for the jury, who would have a right to consider Sundin's opportunity for observation, the time in which he was required to perform the act, of moving the car of lumber, 3 minutes, and numerous other circumstances from which they could reason out

whether or not Sundin ought to have had knowledge of these conditions. It certainly cannot be decided as a question of law. Therefore, we contend, it not being proven conclusively, that Sundin knew of the absence of the cross-pieces and appreciated the unstable and dangerous condition of the load occasioned thereby, and considering all of the evidence from the most favorable standpoint to the deceased, and plaintiffs herein, it must be assumed that he was wholly ignorant of the fact that the usual customs, and orders, had not been carried out, in loading this load of lumber, and ignorant of the neglect of duty on the part of the yard foreman in failing to superintend and see to it that said load of lumber was loaded in the usual and ordinary safe manner.

We then have total absence of knowledge on the part of Sundin of a hidden and concealed danger, which was one of the contributing causes to the accident. Is this Court going to charge Sundin with assumption of a risk of which he was totally ignorant, and of which he could not be presumed to have been advised? If so, then this is extending the rule of "assumption of risk" far beyond that of any other appellate court in the history of the law of master and servant.

Counsel for defendant will argue that the testimony shows that the absence of the cross-pieces from the load was clearly apparent, and that any one could see the conditions by a mere glance, or by casual observation. We assert that the testimony of Egstrom and Brewstead is directly to the contrary. Sundin is dead, and the law will presume that he used ordinary care. This presumption is in the nature of evidence. We ask in all sincerity, was it incumbent upon Sundin, in the few seconds of time, within which he had to act, to make inquiries as to whether or not the load of lumber had been loaded in the usual and ordinary manner, and according to orders, before he would perform the express command of the yard foreman? Was he required, in the exercise of reasonable care, to make a minute inspection of the load, to see whether or not cross-pieces had been put therein? It will be noted that *a part of the load had not yet emerged from between other loads,* out of which it was being propelled, and if there had been cross-pieces in this concealed end of the load, he could not have seen them, and he had a right to presume they were there, even though he did not observe any in the middle of the load. He was required to catch the car "on the fly"; that is, grab hold with his back to it,

and exert his strength shoving the car along to the transfer car, after the car had been started. His mind was necessarily absorbed in attempting to move this heavy car of lumber. We ask again, would he not have a legal right to assume that the yard foreman had performed his duty of superintendence, and had seen to it that the car of lumber was loaded as the rules required it to be, and that the same was safe to be handled, in the manner in which he was required to handle it, and over a track which had been provided by the company, and permitted to exist in the condition which it was in?

We strenuously urge that the questions of assumption of risk, and contributory negligence were questions of fact for the jury. The evidence conclusively shows that Sundin's death was produced by the negligence of defendant, concurring with that of fellow servants, even should this Court disregard the cases cited by us and hold, that, failure to load the lumber properly and safely was the negligence of fellow servants, instead of that of the master.

This Court has often had occasion to consider the law of assumption of risk in cases of this kind, and we will not burden the Court with the hun-

dreds of authorities on this question. We have but to cite the decisions of this Court to demonstrate beyond question that the trial Court was wrong in directing a verdict, and holding as a matter of law, that Sundin assumed the risk of the situation, surroundings and conditions, which produced his death. See the case of Williams vs. Bunker Hill & Sullivan M. etc. Co., October 7th, 1912, Ninth Circuit, 200 Fed. 211.

Here the plaintiff came in contact with a highly charged electric wire. He knew there was some danger, knew it was charged with electricity, knew it was unguarded, and rode in and out of the mine daily on cars propelled by electricity. He worked within a few feet of the wire. He saw the car started and stopped by the power of the electric current, and knew it conducted sufficient electricity to propel the cars. He knew he would be "stung" if he came into contact with it. The Court say:

> "But the risk of the mining company's negligence and of its effect were not of the ordinary risks of Williams' employment, unless such negligence or the effect thereof was known and appreciated by him, or was obvious."

Assuming now, that the jury had found, had they been permitted to do so, that Sundin did

not know of the absence of the cross-pieces from the load, and there is certainly sufficient evidence to justify a jury in so finding, even the trial judge does not presume to find this fact against plaintiffs, how could Sundin appreciate the risk of the load collapsing, which collapse was produced by both condition, to-wit: Failure to put cross-pieces or binders through the load, and the defective condition of the track. We must bear in mind that in order to charge assumption of risk, he must either know of both of these conditions, which contributed to causing the collapsing of the load, or they must have been so apparent that he must be presumed, as a matter of law, to have had actual knowledge, and appreciated the risk incident to both conditions.

Quoting again from the Williams case, *supra,* the Court say:

> "But the knowledge does not necessarily lead to the conclusion that results of such contact are appreciated."

We say, as the Court said in the Williams case in substance: Can it be said, that a man, unskilled in the use of handling cars, *over defective tracks,* and with loads that are not loaded by the ordinary methods, ought to comprehend or appreciate the danger incident to two causes, one of

which he is ignorant, and the other of which he has knowledge of the physical conditions, with no experience in operating cars over defective tracks, all of which is due to the master's negligence?

This Court further says in the Williams case, *supra*:

> "The distinctions sometimes drawn between knowledge of danger and appreciation of risk are not confusing, when we consider that knowledge really means such an understanding of the peril as carries with it an appreciation of the danger. We might say here that there was knowledge of danger, yet no actual appreciation of the risk to which Williams was exposed; that is, he knew of danger by the exposed wire, but he did not know of the risk of his act in touching it with a hose in his hand—in other words, he did not appreciate the peril that surrounded him."

We think the trial Court committed the very error which this Court referred to in the above quotation. The judge confused the fact, of knowledge of "physical conditions," with knowledge and appreciation of the risk incident to the surroundings. This Court, quoting from Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 725, say:

> "Assumption of risk rests upon the maxim, *Volenti non fit injuria,'* and upon the contract of employment. It rests upon the prin-

> ciple that no legal injury can be inflicted upon one who willingly assumes the known or obvious risk of it, and hence it includes the risk of known or obvious defects and dangers which the master or the foreman directs the servant to incur during the employment; for the latter is as free to decline to obey such an order as he is to decline to take or to continue in the employment and where he knows and appreciates the danger as well as the master or the foreman, he becomes subject to the maxim, 'Upon the willing no legal injury can be inflicted.' The order or direction of the master, or of the foreman, to the servant to work at a specified place, or with certain appliances, does not release the servant from his assumption of the apparent risks and dangers of defects in the place, structure, or appliances that are known to him, or are 'so patent as to be readily observed by the reasonable use of his senses, having in view his age, intelligence, and experience.' Railroad Co. v. Jones, 95 U. S. 439 (24 Law Ed. 506). * * *."

Can it be said that Sundin willingly assumed the risk of a load of lumber falling upon him, due to not being properly secured, bound and protected when he was totally ignorant of that fact?

This Court also quotes with approval, National Steel Co. v. Nore, 155 Fed. 62, in which Judge Lurton, while judge of the 6th Circuit, uses the following language:

> "To defeat an action by the defense of assumption of risk, the employer must show, not

> only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself. There is a distinction between knowledge of defects or knowledge of alleged negligent acts, and knowledge of the risks resulting from such defects or acts. In Cooley on Torts (3d Ed.) 1048, the rule is stated in these words: 'It is essential to the assumption of risk, not only that the servant shall know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged."

We ask the Court to consider the numerous cases cited in the Williams case, *supra,* without burdening the Court by especially citing them herein.

The case of Bunker Hill & Sullivan M. etc. Co. v. Jones (9th Circuit), 130 Fed. 813, is another opinion of this Court, citing numerous authorities, upholding our contention on this question.

We call the Court's attention especially to Puget Sound Ry. Co. vs. Harrigan (9th Circuit), 176 Fed. 488, where this Court say:

> "Of course, it is a matter of common knowledge that there is always more or less personal risk in the occupation of a railroad em-

> ploye. In accepting his employment, the plaintiff assumed all the ordinary and usual risks incident thereto, not only those which he knew, but those which he might, in the exercise of reasonable care, have discerned. But he assumed such risks with the recognized qualifications, one of which is that the employer shall use usual care to obviate or at least minimize the danger, and he did not assume the risk of latent defects, notwithstanding that his opportunity of discovering them was the same as that of his employer. He did not assume the risks arising from his employer's negligence, which were not incidental to the business, when he had no actual knowledge of the same. Union Pacific Ry. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; Texas & Pacific Ry. Co. v. Archibald, 1700 U. S. 655, 18 Sup. Ct. 777, 42 L. Ed. 1188."

One of the most instructive cases on this question, and one which has collated a large number of authorities is the case of N. Y., N. H. & H. Ry. Co. vs. Vizvari (2nd Circuit), 210 Fed. 118. This decision has to do with the claim of assumption of risk and also contributory negligence.

This Court must keep in mind the fact that Sundin was ordered to do the very thing which he was doing when he got killed. He was acting under the express command of the master's representative Moe, the yard foreman, and all of the courts and authorities are very loath to charge an

employe with assumption of risk of an injury resulting from obeying the express command of the master. The Supreme Court of Washington in Hull vs. Davenport, 93 Wash. 16, decided Dec. 1916, in a very able opinion written by Mr. Justice Ellis, clearly supports this Court, and also our contention, wherein it is said:

> "Respondents contend that, even assuming that the question of primary negligence was one for the jury, appellant in any event assumed the risk of injury in using the elevator. It is argued that all of the obvious risks, even those of extraordinary danger resulting from the negligence of the master to perform a positive duty, are, as a matter of law, assumed by a servant in the absence of a complaint to the master and a promise on the master's part to remove the danger. The rule thus broadly stated without qualification is not the law. In the case before us, there was a standing order posted at the entrance to the elevator: 'Use the elevator.' In addition to this, there was evidence that the employees had been specifically directed to use it. True, the sign may not have been there that morning, but the order it conveyed had never been countermanded. It is only where the danger of the act which the servant undertakes is not only open, patent and obvious alike to man and master and equally appreciated by both, but it is plain that a reasonably proudent man would not undertake the act at all, that the servant assumes the risk in obeying the master's order. The rule is thus tersely stated by the Supreme Court of Ohio:

"The clear result of the best considered cases is, that where an order is given a servant by his superior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the Court." Van Duzen Gas Etc. Co. v. Schelies, 61 Ohio St. 298, 309.

See, also, Waterman v. Skokomish Timber Co., 65 Wash. 234, 118 Pac. 36; Williams v. Spokane, 73 Wash. 237, 131 Pac. 833; Rogers v. Valk, 72 Wash. 579, 131 Pac. 231.

But it may be insisted that the sign was not an order. If it was not, the query arises, what was it there for? It is not claimed that this elevator was used or intended to be used by the public. It was almost wholly used by employees such as appellant. The doctrine of assumption of risk, whether assumed to be founded in the fiction of an implied contract with pay commensurte with the danger, or whether it be referred to the maxim, Volenti non fit injuria (3 Labatt, Master and Servant, 2 Ed., Sec. 1285), *is artificial and harsh at best. It should not be extended beyond its reasonable limits.* It must be remembered that the plan of the establishment and the coordination of work is that of the master, deliberately adopteed without consulting the servant. In adopting the plan, the master must be assumed to have considered it with a maturity and deliberation not possible to the servant absorbed

in the details of his daily duties. Whenever, therefore, there is room for reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one for the jury, especially where the servant is proceeding under an order of any kind, however communicated. As said by this Court in Bailey v. Mukilteo Lumber Co., 44 Wash. 581; 87 Pac. 819:

"Any other theory in law would be harsh and unjust. Hence, the courts generally have decided that the servant will not be charged with assuming the risk of a place unless the peril is so apparent that there could be no conflicting opinion between men of ordinary prudence and understanding; and when this appears plainly, and then only, it becomes the duty of the Court to hold that as a matter of law the risk was assumed."

In the case of Illinois Steel Co. v. Schymanowsky, heretofore referred to, 44 N. E. 876, on the question of assumption of risk and contributory negligence, the Court say:

"Undoubtedly the general rule is that an employe who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect. But this rule is subject to qualification. In the first place, there is a distinction between knowledge of defects and knowledge of the risks resulting from such defects. The servant is not chargeable with contributory negligence if he knows that defects exist, but does not know, or cannot know by the exercise of ordinary prudence,

that risks exist, Cook v. Railway Co., 34 Minn. 45, 24 N. W. 311; Coal Co. v. Haenni, 35 N. E. 162. Appellee's knowledge of the fact that the light was not sufficient for work on a dark and stormy night did not indicate that he knew of the unsafe condition of the pile of ore, and of the risk in working near it. In the next place, a master is liable to a servant when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated if, in obeying the order, he acts with tthe degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils. The servant has a right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing or equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury. Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Syrup Co. v. Carlson, 145 Ill. 210, 40 N. E. 492; Railroad Co. v. Leathers, 40 N. E. 1094. These questions of fact are settled in this case by the judgment of the Appellate Court affirming that of the Trial Court."

Inasmuch as this accident happened in the State of Idaho, we desire to call the Court's attention to the decision of the Supreme Court of that state in the case of Knauff vs. Dover Lbr. Co., 120 Pac. 157. Reading the last five lines of page 160 and two-thirds of page 161, which is the argument of the Court on the question here presented, the Court approves of an instruction given by the Trial Court, as follows:

> "The plaintiff had a right to assume and rely and act upon the presumption that the defendant had used reasonable care in furnishing a reasonably safe floor and bed of the slasher upon which he was required to pass in the duties of his employment, if he was so required to pass, and that plaintiff was not required to search or inspect such floor for defects therein that were not obvious or apparent. He had only to exercise the care that an ordinary prudent person would have exercised under like circumstances."

We do not desire to burden the Court unnecessarily by and further extended argument on these questions, and while we greatly admire, honor, and respect the ability, fairness and profound desire to do justice, which is always exhibited by the honorable judge who tried this case, nevertheless, we feel that he has fallen into error in holding, first, that the negligent manner in which the load of lumber was loaded, and the failure to insert cross-

pieces or binders in the load, or to adopt some other efficacious method to make the load safe while being transported over the defective tracks which defendant elected to use, was the negligence of fellow serfants, and also in holding, as a matter of law, that Sundin assumed the risk of losing his life or of being injured by the conditions which produced his death.

We think that even if this Court should disregard all of the authorities which we have cited herein, and hold that the negligence in failing to properly safeguard the load by the use of the ordinary cross-pieces and binders, was the negligence of fellow servants for which defendant is not responsible, in any event, this Court must reverse the judgment of the Lower Court and permit a jury to pass upon the questiin of whether or not Sundin assumed the risk incident to the surrounding conditions, of which he was ignorant, and also whether or not he assumed the risk incident to the negligence of the master, concurring with that of fellow servants, which negligence produced Sundin's death.

We cannot see how this Court can reconcile its former decisions on the question of assumption of risk, with a decision of affirmance in the case

at bar. It would certainly take a very ingenious and analytical mind to convince any lawyer or layman of the distinction. We are mindful of the desire on the part of this Court to follow precedents, and we know that the Federal courts are what is termed "very strong" on the fellow servant doctrine. The people, from constant reading of the decisions of the Courts, which made up the common law, have become thoroughly convinced of the injustice of a great many of the decisions, and feel that the Courts, from time to time, vied with each other in extending the fellow servant rule beyond just and reasonable limits, always in the interest of the master, and against the servant; therefore, a great many of the states have abolished the fellow servant rule altogether, and even the Federal Congress has gone a long ways in thatd irection, in passing the Federal Employer's Liability Act.

DEFENDANT CLAIMS THAT SUNDIN WAS WARNED NOT TO WORK ON THE SIDE OF THE CAR.

It will be contended by defendant that the evidence conclusively shows that Sundin was warned by the yard foreman not to assist in moving a car,

by standing along the side, but the evidence will not bear out this contention.

We quote from the testimony of the yard foreman, Andrew Moe (Tr. .....):

> "THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?
>
> A. They do sometimes.
>
> THE COURT: They do sometimes?
>
> A. Yes.
>
> THE COURT: You may proceed."

And again on page ....., Tr.:

> "Q. Mr. Moe, assuming that there are three men behind shoving, and no room for any more, where does the fourth man, if he does help, shove the car out, take hold of the car ordinarily, according to the custom in vogue?
>
> THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?
>
> A. It is customary part of the time.
>
> MR. PLUMMER: Now again, when the man takes hold as the Court has referred to in his question, with his back to it, when does he take hold of the car?
>
> THE COURT: In that way. Where is the

car, in what position is it when he takes hold in that way?

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads."

Again we quote from page..... of the record, from the testimony of the yard foreman, Andrew Moe:

"Q. And when those cars were moved, when there was a heavy load, for instance, and there was three men on the end shoving, where was it customary and usual for the other man who had to help, to have hold of the car?

A. Any place that he could get hold of it.

MR. PLUMMER: Q. State what the fact was before Mr. Sundin's death, if it was frequently the custom for men to get hold of the car like that (illustrating), with his back to it?

A. It was, sometimes.

Q. And did you do that yourself, sometimes?

A. Yes."

Without quoting at length, we will suggest that the testimony of witnesses Brewstead and Egstrom shows conclusively that the load was being moved at the time Sundin was injured, in the usual and

customary manner, by Sundin assisting from the side of the load.

Now, as to warning which it was claimed was given Sundin, the testimony simply shows that he and others were warned not to shove from the side of the car "when it looked dangerous."

WITNESS ANDREW MOE

"MR. NELSON: Q. Is it not a fact, Mr. Moe, that on several occasions you warned the deceased Alex Sundin to keep away from the side of the load

A. I warned them all, I believe, numbers of times."

On re-direct examination, he testified as follows:

"By MR. PLUMMER:

Q. Mr. Moe, counsel asked you about warning the men, and you answered that you warned all of them. Now, in warning them, what did you say, what was your expression that you used?

A. Oh, if I see a load that I thought wasn't quite safe, I said, 'Boys, keep away from that side,' whichever side I might think was unsafe. I dont that lots of times.

Q. And that is what you meant when you answered his question?

A. That is what I meant.

Q. Do you recall of any time having warned Sundin, himself?

A. I don't know if I exactly warned him individually, but there were always three together, and I would talk so that they would all hear it.

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

THE COURT: Why wouldn't they be safe? I mean, what would be the reason for the peril? Can you give us an illustration?

A. Well, sometimes the chainers don't pay close enough attention to loading it straight and nice, and sometimes there will be a rush, a little bit for a few minutes, and they wouldn't place them exactly the way they should, and lots of reasons, and once in a while there will be a load that isn't safe." (See Tr., p.....)

The Court will observe, after reading this testimony, that never at any time, as shown by the record, did Sundin have knowledge of any habit or frequency of neglect in leaving out the strips or binders which held the loads together. All of the warnings which were given him, were, as testi-

fied to by Moe, where loads were improperly loaded or leaned to one side or the other, and it was only when the load "looked dangerous" that the men were not supposed to work alongside of the car.

We might further suggest, in conclusion on this point, that any testimony given by Andrew Moe, who was himself the negligent foreman, is not conclusive. Sundin is dead, and cannot dispute him, and the Supreme Court, as well as this Court, has frequently held that the testimony of an interested witness, although undisputed, is not conclusive. The jury have a right to consider his interest from every standpoint, and to weigh his evidence like any other evidence.

How can it be shown that this particular load of lumber "looked dangerous" to Sundin, who had suddenly been ordered to move this car, when he had not seen it loaded? He could not even tell from where he stood, what sort of lumber was on the car, whether wide boards or narrow boards.

Mr. Moe, the yard foreman, testified that where the boards were wide, they would sometimes only put in two cross-pieces or binders, as that would be sufficient; but where the lumber was of the character of that which fell in this case, being 1x6x16,

they would usually put in 6 cross-pieces or binders. How could Sundin tell that this was 6-inch lumber? The Court must understand that Sundin was standing on the ground when he took hold of the side of the car. The car itself was two feet high from the rails; then we have 55 or 60 boards, one inch in height, which would be approximately a distance of seven feet from the level of the ground to the top of the load. Assuming that Sundin was a man of ordinary height, he could not see on the top of the load at all, therefore, he would not know whether the load consisted of 6-inch boards with 6 binders, or wide boards with only two binders, and these binders or cross-pieces, being simply lath, could be so placed that one was diagonally across the front of the load, and another across the rear, which rear part had not yet emerged from between other loads.

We say emphatically, and earnestly, that to hold Sundin guilty of contributory negligence, or to charge him with assumption of risk of the injury which he received, under the facts in this case, is a gross miscarriage of justice, and is certainly adding insult to injury to permit the master to escape all responsibility for the gross and inexcusable neglect of failing to observe, through its proper officers and yard foreman, how the men

were conducting their work, whether in a safe or dangerous manner, where others were required to follow them in other work, and also to permit and require the use of tracks which are wholly unsafe and out of repair, as is shown by this record.

The two combining negligent conditions causing the death of a loving husband and father, making a widow of the wife, and orphans of the children. Such holdings and rulings do more in the opinion of the writer to cause anarchy and revolt among workmen, than any other one factor. Under the circumstances in this case, presenting the same as a picture, there is not one layman in 10,000 but who would say that this widow and these children ought to recover in this case; that the defendant was grossly negligent in both particulars, and this negligence caused Sundin's death. The courts may be able to educate the lay mind so as to eliminate this opinion, but it will be a hard struggle, and pulling against the tide, because such a holding and ruling does not possess the slightest characteristic of justice.

ERROR IN EXCLUSION AND ADMISSION OF EVIDENCE.

As we are convinced this Court will grant a new trial, we ask the Court to rule and pass upon

certain matters of evidence, the admission and exclusion of which, by the Court, is assigned as error.

Referring to page ..... of the Transcript, the Court permitted defendant to propound to Andrew Moe, a witness for plaintiffs, the following question on cross examination:

> "Q. Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any cross pieces in the load?
>
> MR. PLUMMER: We object to that as not cross examination, and it is a part of their defense, if Your Honor please.
>
> THE COURT: Overruled."

The same question was put thereafter to the same witness in different form, and the Court permitted the same to be answered. The plaintiff objecting, also on the ground that the question simply called for a conclusion of the witness. The admission of this question and other questions of the same character, to this witness, seems to us was error. In the first place, it was not cross examination. The plaintiffs did not ask Mr. Moe a single question on that subject, and it simply called for a conclusion of the witness, which we

insist was not proper for the reason that the jury are the ones to draw the conclusion when it hears and understands all of the facts. To permit the witness to testify that Sundin *could* have seen the absence of the strips, or did see them, or ought to have seen them, is practically permitting the witness to decide the very question which the jury is called upon to decide.

The Court will see from the record that we argued the question before the Court, but that it was over-ruled in every particular.

The Court erred in making the following statement in the presence of the jury, in response to an objection of counsel for plaintics, as follows:

"RE-CROSS EXAMINATION.

"By MR. NELSON:

Q. Mr. Moe, do you know whether or not it is customary for a man to place his back up against a load fifty tiers high, in which there were no cross-pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman?

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Thefore, it wouldn't be proper cross examination.

THE COURT: No, it isn t shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He also stated that they weren't supposed to do it."

Thus, the Court will see the trial judge practically told the jury what weight should be given to the evidence on this subject. The testimony of Moe was, up to this time, as follows:

"THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?

A. It is customary part of the time. (P. ....., Tr.)"

(Again, a question by the Court):

"THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?

A. They do sometimes.

THE COURT: They do sometimes?

A. Yes.

THE COURT: You may proceed.

MR. PLUMMER: Q. Now again, when the man takes hold as the Court has referred to in his question, with his back to it, when does he take hold of the car?

THE COURT: In that way. Where is the car, in what position is it *when he takes hold in that way?*

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads." (Tr., p.....)

This Court will observe, in the face of this evidence, the Court practically told the jury there was no evidence that it was customary for the men to take hold of the car in this way, that is, along the side of it. The Court also said that Moe testified that the men were not supposed to take hold of it in this way.

The testimony of Moe, when he said the men were not supposed to go *alongside of it,* refers to when the car is started from between the other loaded cars, and following that answer, counsel for plaintiff attempted to show by this witness, that when there were four men, one of them must wait until the car emerges from between the other loads, and then take hold of the side; but the Court argued and ruled out plaintiffs' questions on the ground that they were leading, when no objection had been interposed by defendant.

We think this observation of the Court was wholly outside of the scope of reasonable comment, and very prejudicial, and should not occur at another trial.

The transcript of the record, at pages....., show the folowing:

'Q. Referring to the ends of these short tracks upon which the car was going that you and your gang was pushing on the day that Mr. Sundin was killed,—I am referring now to the ends of these short tracks—how were the ends of those rails kept with reference to the rails on the flat car that you have described, ordinarily kept?

MR. NEUSON: If Your Honor please, we object to that as irrelevant, incompetent, and immaterial, and not within the issues in this case.

THE COURT: Sustained.

MR. PLUMMER: Does Your Honor hold that we can't show the condition of the tracks? I will state, if Your Honor please, that in offering that, we are charging the defendant here with negligence in maintaining a track in a defective condition. The mere showing of the existence of a condition isn't showing negligence unless you show that it is an abnormal condition or a condition that doesn't ordinarily exist or is not in an ordinary form. We want to show how it was usually kept, whether on a level or otherwise, and then show the condition this particular track was in at the time the accident happened, which makes the connection, showing negligence. It is absolutely essential, it seems to me.

THE COURT: The only difficulty about that is that you haven't alleged what the usual

manner was, and you have alleged that the deceased knew of this condition.

MR. PLUMMER: I am afraid the Court is probably confounding assumption of risk is one proposition, and negligence of the master is another. First we have got to show the negligence of the master.

THE COURT: Yes, but have you alleged anything about the other tracks?

MR. PLUMMER: I have alleged that they negligently permitted them to sink down lower than was safe.

THE COURT: Then why is it material to know how the other tracks were?

MR. PLUMMER: For the purpose of comparison.

THE COURT: The objection is sustained.

MR. PLUMMER: Plaintiff's offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employes were attempting to place the loaded car of lumber, and that on that particular track that this car of lumber was being shoved over, the ends thereof were allowed by the defendant to get in a condition—

THE COURT: That is another question.

MR. PLUMMER: All right, then. Just the first part is what I will offer. For the purpose of showin, or at least showing circumstances tending to prove negligence on the part of the defendant in maintaining and permitting the track to be in the condition it was in at the time he was injured.

THE COURT: The offer is denied, for the reason that there is no averment in the complaint charging that the other tracks were kept in any particular condition, or that the deceased knew of any such condition."

Here we attempt to show negligence on the part of the company in the condition in which the track were maintained, and for that purpose, and by way of comparison, for the benefit of the jury, we attempted to show that these short tracks were ordinarily maintained on a level with the tracks on the transfer car, so that the ends of the tracks would match, and no shock would be occasioned in running a car over the joint. We showed that it was allowed to sink and settle a distance of an inch and a half. This offer of evidence was excluded by the Court on the ground suggested by the Court that it had not been pleaded in our complaint. Of course, no such suggestion or objection was interposed by the defendant. The complaint alleges negligence in the maintenance of these tracks, and describes in what respect

these tracks were out of repair, and in a dangerous condition. The jury might infer, without any evidence, that it was customary and usual to have all of the tracks an inch or two lower than the tracks on the transfer car. Again, this evidence was important to plaintiffs as showing that Sundin had had no previous experience in operating cars over that sort of tracks, and therefore,d id not appreciate nor understand the amount of shocks which would be caused to the car of lumber in forcing it over the tracks in that condition. The fact that he was an experienced man, operating cars over level tracks, would not be a circumstance to show that he appreciated or understood what migh happen by running a car of lumber over tracks which, the last time he saw them, previous to the injury, were only ¾ of an inch lower than the other tracks, but when he was injured, it had settled to an inch and a half lower, and we insist and assert with confidence that it was neither proper nor necessary to plead this evidence, that is, that the other tracks were ordinarily maintained on the level.

It is a rule of pleading that we must state the ultimate fact, that is, the negligence and unsafe condition of the track, and the particulars of its unsafety. This evidence goes to prove the un-

safety of it. Just the same as proving the defective appliances of any sort. It is customary and usual to permit evidence to show what customs prevail generally in the carrying on of like work.

This is not a matter of pleading, it is a matter of evidence, and we think the evidence should have been admitted, and for the purpose of this case, on this Writ of Error, the Court must assume that ~~what~~ which we offered to prove, ~~after~~ as showing the negligent condition of the tracks, otherwise, we would be deprived of a right to have this point reviewed at all.

We respectfully submit that the judgment in this case should be reversed, and a new trial ordered.

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